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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MAX J. GARCIA, Defendant and Appellant.	B236061 (Los Angeles County Super. Ct. No. KA092511)

APPEAL from an order of the Superior Court of the County of Los Angeles, George Genesta, Judge. Affirmed and remanded with instructions.

Sunnie L. Daniels, under the appointment of the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, Pamela C. Hamanaka, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

A jury found defendant and appellant Max Garcia (defendant) guilty of second degree robbery and attempted kidnapping to commit another crime. On appeal, defendant contends that the prosecutor engaged in misconduct by eliciting evidence of an uncharged crime and that, in the event his misconduct claim has been forfeited, his trial counsel provided him with ineffective assistance at trial. Defendant also claims that he is entitled to one additional day of conduct credit.

We hold that defendant forfeited his prosecutorial misconduct claim by failing to object to the uncharged crime testimony on the grounds of misconduct and failing to request an admonition. We further hold that, based on the record, we cannot determine defendant's claim of ineffective assistance of counsel on appeal. We also agree that defendant is entitled to one additional day of conduct credit.

FACTUAL BACKGROUND[1]

Defendant and appellant worked together at a gas station in Pomona from approximately the beginning of April 2010 to the beginning of July 2010. On November 2, 2010, at approximately 11 p.m., Padilla, who was working at the gas station alone, was cleaning the pumps outside. Defendant, his face partially covered with a mask, approached Padilla, threatened him, and told him to open the gas station store. Padilla opened the door to the store and gave defendant, who was armed with a knife, the cash in the register. Defendant then ordered Padilla to a back room and told him that he was going to tie him up. Padilla escaped and called 911.

In his case, defendant presented testimony from his wife and mother-in-law that he was at home on the night of the robbery and through the morning after.

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[1] Because we resolve this appeal on procedural grounds, we provide only a summary of the facts underlying the crimes charged to give context to the procedural background and discussion.

PROCEDURAL BACKGROUND

In an information, the Los Angeles County District Attorney charged defendant in count one with second degree robbery in violation of Penal Code section 211[2] and in count 2 with attempted kidnapping to commit another crime in violation of sections 664 and 209, subdivision (b)(1). The District Attorney alleged as to both counts that defendant personally used a deadly weapon within the meaning of section 12022, subdivision (b)(1) and had been convicted of a prior serious or violent felony within the meaning of sections 667, subdivisions (b) through (i), 1170.12, subdivisions (a) through (d), and 667, subdivision (a)(1).

Following trial, the jury found defendant guilty on counts 1 and 2, but found the personal use of a deadly weapon allegation not true. Defendant admitted the prior strike and prior serious felony conviction.

At the sentencing hearing, the trial court sentenced defendant to an aggregate of 14 years comprised of a middle term sentence of seven years on count 2, doubled to 14 years based on the prior strike allegation, plus an additional five year term based on the prior serious felony conviction. Pursuant to section 654, the trial court stayed the sentence on count 1. The trial court awarded defendant 348 days of presentence custody credit comprised of 304 days of actual custody credit and 44 days of conduct credit.

DISCUSSION

A. Background

At the preliminary hearing, the prosecution's witness, victim Carlos Padilla, was asked whether he had any disagreements or fights with defendant. In response, Padilla testified about an incident between him and defendant involving a bicycle and a third

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[2] All further statutory references are to the Penal Code unless otherwise indicated.

party. According to Padilla, defendant thought Padilla had "ratted [defendant] out" to the third party concerning the bicycle incident.[3]

At a subsequent hearing involving section 402 motions, the prosecutor raised the issue about the bicycle, but informed the trial court that he did not intend to raise it with the jury. The trial court then asked defense counsel if they were going to raise the issue and they answered in the affirmative. The prosecutor responded that he did not "see the relevance [of the issue] unless [defense counsel made] an offer of proof." The trial court explained that "[a]nimus is always an issue" when the victim of the crime identifies the defendant as the perpetrator and there is no "other direct evidence." The trial court then advised defense counsel that it "expect[ed them] to hit [the issue] and get out of it and move on."

At a hearing just prior to opening statements, defense counsel again raised the issue about the bicycle and informed the trial court that it was an issue defense counsel "might go into . . . ." The prosecutor responded that if the court's view was that "the bike incident is relevant because it goes to [Padilla's] bias, that's fine." Defense counsel then described the incident for the trial court and the court observed that "[i]t's a stretch, but [I will allow] the jury [to] decide what weight to give that issue," a ruling with which defense counsel agreed.[4]

During direct examination of Padilla, the following exchange took place concerning the bicycle incident. "[Prosecutor]: [Padilla], did you and [defendant] ever get into any arguments or disagreements about anything? [¶] [Padilla]: Yeah. [¶] [Prosecutor]: What about? [¶] [Padilla]: About a bike. [¶] [Prosecutor]: Okay. A bike? [¶] [Padilla]: Yeah. [¶] [Prosecutor]: Tell us, what happened in regards to a

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[3] Padilla's preliminary hearing testimony about the bicycle incident did not provide details about the nature of the incident.

[4] Defendant contends that during this hearing, one of his attorneys informed the trial court that defendant would not be "opening the door on the alleged motel incident." But subsequent to that statement, both of defendant's attorneys agreed with the trial court that the issue could be weighed by the jury.

bike? [¶] [Padilla]: [A man] that used to live next door in the motel. He had left his bike, like, in the gas station. And [defendant] got it, and I was leaving. And [defendant] told me he was going to take care of it—keep it for [the man] so he could give it to him, like, in the morning when [the man] got off. [¶] And after—after—like, when I went back to work, the [man] told me he [had not] seen his bike. [¶] [Defense Counsel]: Objection. Hearsay. [¶] [The Court]: Question is not hearsay. Overruled. [¶] [Prosecutor]: The [man]—okay, let's back up. Okay, sorry. Trying to do two things at one time. The—you said that there was a bike? [¶] [Padilla]: Yes. [¶] [Prosecutor]: Let's start with the beginning. We don't know what you're talking about. Who had the bike the—originally, the first time, who has the bike? [¶] [Padilla]: Who has the bike? [¶] [Prosecutor]: Yes. [¶] [Padilla]: Yes. [¶] [Prosecutor]: Who had the bike? [¶] [Padilla]: [Defendant]. [¶] [Prosecutor]: What happened when [defendant] had the bike? [¶] [Padilla]: He sold it to some guy. [¶] [Prosecutor]: [Defendant] sold a bike to some guy? [¶] [Padilla]: Yes. [¶] [Defense Counsel]: Objection. Foundation. [¶] [The Court]: See counsel sidebar. Court Reporter."

At the side bar conference the trial court and counsel engaged in the following colloquy. "[The Court]: [Prosecutor], I know where you want to go with this; however, the vehicle, that being this witness on direct, given his—his—not the sharpest pencil in the drawer, so to speak. I only say that it appears you're going to be leading him a lot. Also, the danger of introducing prior acts of the defendant amounting to a crime. Sounds like [Evidence Code section] 1101(B) to me. [¶] [Prosecutor]: Okay. [¶] [The Court]: I—the advantage of cross-examination is being able to ask leading questions. The disadvantage of preempting that is having things come in that I don't want to be visiting. So tread very, very carefully. [¶] [Prosecutor]: That's fine. I'll move on. I'm trying to set this-- [¶] [The Court]: I know what you're trying to do. The question is this . . . do you have the kind of witness who can pick up the cues, and has this witness been admonished in terms of what he is—can and cannot touch. Basically saying he sold a bike. I think that's what you're saying. This guy stole a bike and what are you asking the jury to consider that for? So he happened to steal a bike but his dispute was

something else. The dispute was what? [¶] [Prosecutor]: The—well, couple of things. One is—I don't—I'll move on. [¶] [The Court]: What is—what are you offering it for? [¶] [Prosecutor]: The only reason I'm offering it is because the defense-- [¶] [The Court]: I know. But what is the nature of the dispute? What was the deal between the bike and the defendant. [¶] [Prosecutor]: Again, your Honor. I don't know. My understanding from the [preliminary hearing] transcript is that somehow because of his knowledge of the bike, the witness's knowledge of the bike, the defendant accused the witness of ratting the defendant out to some guy who lives in the motel and this is the basis for why the defense [filed a section 402 motion regarding] this issue with the bike and that's what leads to the issue of the bias with the bike because it's a source of conflict or something. So, I'm trying to establish on direct that same premise, which [is] that the defendant believes that this victim ratted—the victim ratted him out. [¶] [The Court]: Well, I understand what you want to do, but you're opening doors I don't think you want to open. If counsel wants to open doors as to cross on that incident, that's a different matter, but it's different implications with you opening the door and the manner in which it's opened. [¶] [Prosecutor]: That's fine. [¶] [The Court]: Anything from the defense? [¶] [Defense Counsel]: I do want to, one, address the leading questioning by counsel of this witness. I don't want to object to every question, but it's getting to the—counsel's borderline testifying. I don't want to object to every question."

The prosecutor did not mention the bicycle incident during his initial argument, but defense counsel raised it in her argument, suggesting that it showed Padilla's bias toward defendant and gave Padilla a motive to misidentify defendant as the perpetrator. During rebuttal, the prosecutor referenced defense counsel's argument that Padilla misidentified defendant as the perpetrator as a result of the bicycle incident. Following a sidebar conference, the prosecutor resumed rebuttal argument and pointed out to the jury that defense counsel was complaining, on the one hand, that the argument between Padilla and defendant had not been fully explained, but on the other hand, that defense counsel did not ask Padilla for details about the argument when she had the opportunity to do so.

B. Forfeiture

Defendant contends that the prosecutor engaged in misconduct when he elicited on direct examination of Padilla testimony that suggested defendant, by selling the bicycle, stole it. The prosecutor counters, inter alia, that defendant forfeited the misconduct claim by failing to object to the testimony on the basis of misconduct and failing to request a curative admonition.

"To preserve . . . a claim [of prosecutorial misconduct] for appeal, 'a criminal defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the impropriety. [Citations.]' (*People v. Cole* (2004) 33 Cal.4th 1158, 1201 [17 Cal.Rptr.3d 532, 95 P.3d 811].) The failure to timely object and request an admonition will be excused if doing either would have been futile, or if an admonition would not have cured the harm. (*Ibid.*; *People v. Hill* (1998) 17 Cal.4th 800, 820 [72 Cal.Rptr.2d 656, 952 P.2d 673].)" (*People v. Clark* (2011) 52 Cal.4th 856, 960.)

Defendant concedes that his trial counsel did not object to the uncharged crime testimony[5] or request a curative admonition, but argues those failures should be excused because an objection under the circumstances would have been futile and because an admonition would not have cured the prejudice that resulted from the testimony. We disagree.

Contrary to defendant's assertion, it would not have been futile to object to the uncharged crime testimony based on prosecutorial misconduct. Once Padilla testified that defendant "sold" the bicycle, the trial court recognized the potential that further testimony on the issue might elicit evidence of an uncharged crime, so it cut off further testimony on the issue and conducted a side bar conference. During the conference, however, the trial court indicated its view that, although the prosecutor was in "danger" of eliciting inadmissible evidence of an uncharged crime, he had not yet done so.

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[5] Although it is unclear whether Padilla's testimony that defendant "sold" the bicycle raised a reasonable inference that, in doing so, defendant stole it, we will assume without deciding that it potentially raised such an inference and therefore refer to that testimony as the "uncharged crime testimony."

Therefore, had defendant's trial counsel objected at that point and argued that the prosecutor had already engaged in misconduct by eliciting testimony from which the jurors could infer that defendant stole the bicycle when he sold it, the trial court could have addressed the issue. Thus, a timely objection would not necessarily have been futile.

Similarly, it is not evident from the record that an admonition would not have cured any potential prejudice from the uncharged crime testimony. To the contrary, as discussed above, had defendant's position on the misconduct issue been timely raised with the trial court during the side bar conference, the court may have been able to fashion an admonition advising the jurors to disregard any negative inference that may have arisen from defendant's act of selling the bicycle. Therefore, defendant's failure to request such a curative admonition forfeited the issue on appeal.

C. Ineffective Assistance of Counsel

Defendant contends that if his prosecutorial misconduct claim was forfeited at trial, his defense counsel provided ineffective assistance of counsel. According to defendant, his trial counsel had no reasonable basis for the failing to object to the testimony and request an admonition.

"'To establish a violation of the constitutional right to effective assistance of counsel, a defendant must show both that his counsel's performance was deficient when measured against the standard of a reasonably competent attorney and that counsel's deficient performance resulted in prejudice to defendant in the sense that it "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."' (*People v. Kipp* (1998) 18 Cal.4th 349, 366 [75 Cal.Rptr.2d 716, 956 P.2d 1169], quoting *Strickland v. Washington* [(1984)] 466 U.S. [668,] 686.) Preliminarily, we note that rarely will an appellate record establish ineffective assistance of counsel. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267-268 [62 Cal Rptr.2d 437, 933 P.2d 1134].)" (*People v. Thompson* (2010) 49 Cal.4th 79, 122.)

Here the record establishes that there might have been a reasonable tactical basis for not objecting to the uncharged crime testimony. Prior to trial, defendant's trial counsel twice indicated that defendant intended to raise the issue about the dispute between defendant and Padilla over the bicycle to show bias. After the prosecutor elicited the fact that defendant "sold" the bicycle, defendant's trial counsel made no objection and instead argued to the jury that the dispute over the bicycle may have biased Padilla against defendant and resulted in Padilla misidentifying him as the perpetrator. As noted, Padilla did not testify that defendant "stole" the bicycle; he testified that defendant "sold" it. Therefore, a reasonable attorney in defense counsel's position could have determined that the potential prejudice from that testimony was questionable, at best, and that the potential benefit from arguing the bias issue outweighed any such potential prejudice. Because we cannot conclude from the record that no reasonable attorney would have failed to object and request an admonition under the circumstances, we cannot resolve the ineffective assistance claim on appeal.

D. Conduct Credit

Defendant contends, and the Attorney General agrees, that defendant was entitled to 45 days of conduct credit instead of the 44 days he was awarded by the trial court. According to defendant, because he was convicted of a violent felony, he was subject to the 15 percent limitation on presentence conduct credit set forth in section 2933.1. By defendant's calculation, 15 percent of 304—the number of days of actual custody credit—is 45 days. Therefore, defendant maintains he is entitled to one additional day of conduct credit. We agree with the parties that defendant is entitled to 45 days of custody credit.

DISPOSITION

The judgment of conviction is affirmed and the matter is remanded to the trial court with instructions to correct the abstract of judgment to reflect that defendant is entitled to 45 days of conduct credit, in addition to 304 days of actual custody credit, for a total award of 349 days of presentence custody credit.

MOSK, J.

We concur:

TURNER, P. J.

KRIEGLER, J.